tion of administrative error' or the Secretary's 'concession of error.'" *Ibid.*

2. Petitioner also cannot obtain fees under the EAJA because the CAVC did not abuse its discretion in concluding that the Secretary's position was substantially justified. Petitioner contends (Pet. 11-13) that the court of appeals erred by adopting a so-called "*Johnson* rule" in this case which, according to petitioner, authorizes a "finding of substantial justification based on nothing more than absence of prior case law." That contention misstates the standard applied by the CAVC and the court of appeals in this case and by the CAVC in the *Johnson* case, which "centers the inquiry for a substantial justification on the 'totality of the circumstances.'" Pet. App. 6-7 (quoting *Johnson*, 17 Vet. App. at 440). Under the totality of the circumstances standard, "whether a case is one of first impression is only one factor for the court to consider." *Felton* v. *Brown*, 7 Vet. App. 276, 281 (1994).

"Where, as here, an appellant alleges that the Secretary's position was not substantially justified, the Secretary has the burden to prove that his position was substantially justified at both the administrative and litigation phases." *Johnson*, 17 Vet. App. at 440 (citing cases). "[S]ubstantially justified" means "justified to a degree that could satisfy a reasonable person." *Pierce* v. *Underwood*, 487 U.S. 552, 565 (1988). "[T]he government's failure to prevail does not raise a presumption that its position was not substantially justified." *Felton* v. *Brown*, 7 Vet. App. 276, 280 (1994) (quoting *Kali* v. *Bowen*, 854 F.2d 329, 332 (9th Cir. 1988)). Instead, whether the government's position was substantially justified is determined "based upon the totality of the circumstances, including merits, conduct, reasons given,

and consistency with judicial precedent and VA policy with respect to such position, and action or failure to act, as reflected in the record on appeal and the filings of the parties before the Court." *Ozer* v. *Principi*, 16 Vet. App. 475, 476 (2002) (quoting *Stillwell* v. *Brown*, 6 Vet. App. 291, 302 (1994)). Also relevant to the inquiry is whether the case was "one[ ] of first impression involving good faith arguments of the government that are eventually rejected by the Court." *Johnson*, 17 Vet. App. at 440 (quoting *Stillwell*, 6 Vet. App. at 303). The decision of the lower court regarding substantial justification is reviewed under an abuse of discretion standard. *Halverson* v. *Slater*, 206 F.3d 1205, 1208 (D.C. Cir. 2000) (citing *Pierce*, 487 U.S. at 563).

In this case, as the court of appeals concluded, the CAVC appropriately applied the "totality of the circumstances" standard in determining that "the Secretary's position at the administrative and litigation levels was substantially justified." Pet. App. 8. With respect to the administrative level, "in a case in which the Secretary's regulation has been invalidated," the Secretary must show substantial justification "both in promulgating the regulation and in his position during adjudication of the claim before the agency." *Ozer*, 16 Vet. App. at 477 (citing *Felton*, 7 Vet. App. at 283).

Here, the regulations were reasonably promulgated as part of an effort "to shorten appeal processing time and to reduce the backlog of claims awaiting decision." *Johnson*, 17 Vet. App. at 441 (quoting 66 Fed. Reg. 40,942 (2001)). Although the statutory language required that "[a]ll questions in a matter * * * shall be subject to one review on appeal to the Secretary," 38 U.S.C. 7104(a), it did not state that all evidence relating to those questions needed to be considered first by the

regional office. Therefore, there was a reasonable basis for arguing that the Secretary could, in compliance with the statute, "improve the efficiency of the review on appeal to the Secretary" by allowing "the Board to obtain evidence, clarify the evidence, cure procedural defect, or perform any other action essential for a proper appellate decision in any appeal properly before it." *Disabled American Veterans (DAV)* v. *Secretary of Veterans Affairs*, 327 F.3d 1339, 1342, 1346 (Fed. Cir. 2003). That is particularly true in light of the fact that the Board was expressly authorized by statute to "secure an advisory medical opinion from one or more independent medical experts who are not employees of the Department" when "in the judgment of the Board, expert medical opinion, in addition to that available within the Department, is warranted by the medical complexity or controversy involved in an appeal case." 38 U.S.C. 7109(a).

The regulations were the subject of notice-and-comment rulemaking, and the VA did not receive any comments objecting to the proposed new rule on the ground that it was inconsistent with the "one review on appeal" language of 38 U.S.C. 7104(a). See *Board of Veterans' Appeals: Obtaining Evidence and Curing Procedural Defects Without Remanding*, 67 Fed. Reg. 3099 (2002). As a result, the validity of the regulations in light of 38 U.S.C. 7104(a)'s appeal requirement "had not been questioned until several veterans organizations had filed with the Federal Circuit a petition for review" of the regulation in *DAV*. *Johnson*, 17 Vet. App. at 442. Under those circumstances, the CAVC and the court of appeals correctly concluded that the Secretary's promulgation of the regulation was substantially justified. Pet. App. 6-7 (citing *Johnson*, 17 Vet. App. at 442).

The Board's application of the regulation to petitioner's administrative case was also substantially justified because the Board was "bound by law to apply the regulation to the [petitioner]'s claim." *Ozer*, 16 Vet. App. at 478 (citing *Fugere* v. *Derwinski*, 1 Vet. App. 103, 110 (1990)). "Given the existence of the regulation, whose validity had not yet been questioned in this case, the Secretary's position during this part of the administrative phase was also substantially justified." *Felton*, 7 Vet. App. at 284.

With respect to the litigation phase of the case, the Secretary's position before the CAVC was also substantially justified. When the Secretary successfully moves for remand, or cooperates with a successful request for remand, after a regulation is invalidated, the Secretary's litigation position is "substantially justified." *Johnson*, 17 Vet. App. at 442 (citing *Wisner* v. *West*, 12 Vet. App. 330, 334 (1999); *Stillwell*, 6 Vet. App. at 302).

For those reasons, the court of appeals correctly concluded that the CAVC properly applied the totality of the circumstances standard "based on the whole record, including relevant statutory law," Pet. App. 8, and did not abuse its discretion in holding that the Secretary's position at the administration and litigation levels was substantially justified. That fact-bound, case-specific conclusion does not warrant further review by this Court.

3. Petitioner also contends (Pet. 11-15) that the decision below conflicts with decisions of the Seventh and D.C. Circuits. That argument lacks merit because, contrary to petitioner's assertion (Pet. 13), the court of appeals applied the same totality of the circumstances approach in this case that was applied by the Seventh Cir-

cuit in *Marcus* v. *Shalala*, 17 F.3d 1033 (7th Cir. 1994), and by the D.C. Circuit in *Halverson* v. *Slater*, *supra*.

In *Marcus* and *Halverson*, as here, a regulation had been invalidated under the first step of the analysis set forth in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), on the ground that it conflicted with the unambiguously expressed intent of Congress. *Halverson*, 206 F.3d at 1207; *Marcus*, 17 F.3d at 1035. In the ensuing EAJA fee litigation, the courts of appeals considered whether, in spite of the particular merits decision, the government's position was substantially justified. In *Halverson*, the government's position was not substantially justified because the statute explicitly authorized the Secretary of Transportation to delegate certain pilotage duties to the United States Coast Guard, but the regulation instead purported to delegate those duties to the St. Lawrence Seaway Development Corporation. 206 F.3d at 1206-1207, 1211. Noting that the relevant question under EAJA was "whether the Department's position, though rejected, was substantially justified" (*id.* at 1209), the court concluded that it was not, because the government's position had been found "entirely without merit" based on an "elementary application" of basic canons of construction, leaving "no persuasive reason for believing that this was an issue over 'which reasonable minds could differ.'" *Id.* at 1211 (citation omitted).

In *Marcus*, the court concluded that the government's positions were not substantially justified because "six other circuits * * * had [previously] rejected the Secretary's position" and "the Secretary's position was 'unconvincing,' and 'make[s] little sense.'" 17 F.3d at 1038 (citations omitted). In light of that litigation history, the issues were not "close ones," and the court of appeals

concluded that the district court did not abuse its discretion in deeming the government's positions to lack substantial justification. *Ibid.*

Here, as in *Halverson* and *Marcus*, a totality of the circumstances approach was followed. The result was different because the underlying merits decision was not "easy," as in *Halverson*, 206 F.3d at 1212, and because the underlying question was one of first impression as to which reasonable minds could disagree, unlike *Marcus*. Contrary to petitioner's submission (Pet. 11), therefore, there is no "division among the Federal Courts of Appeals."

Further review is not warranted.

4. Petitioner finally contends (Pet. 16) that the court of appeals erred in finding substantial justification because "[w]hen the underlying merits issue is the validity of a regulation * * * the determination of reasonableness cannot be divorced from the *Chevron* analysis in the merits litigation, at least when the regulation is invalidated under *Chevron*'s step one." That argument is contrary to this Court's precedents.

This Court has made clear that "a position can be justified even though it is not correct, and * * * it can be substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce*, 487 U.S. at 566 n.2. "Congress did not * * * want the 'substantially justified' standard to 'be read to raise a presumption that the Government position was not substantially justified simply because it lost the case.'" *Scarborough* v. *Principi*, 541 U.S. 401, 415 (2004) (quoting H.R. Rep. No. 1005, 96th Cong., 2d Sess. Pt. 1, at 10 (1980)).

Therefore, the determination of the "substantial justification" of the government's position "may not be col-

lapsed into [the] antecedent evaluation of the merits." *Cooper* v. *United States R.R. Ret. Bd.*, 24 F.3d 1414, 1416 (D.C. Cir. 1994); see *Kiareldeen* v. *Ashcroft*, 273 F.3d 542, 554 (3d Cir. 2001); *United States* v. *Paisley*, 957 F.2d 1161, 1167 (4th Cir.), cert. denied, 506 U.S. 822 (1992); *Welter* v. *Sullivan*, 941 F.2d 674, 676 (8th Cir. 1991); *Luciano Pisoni Fabbrica Accessori Instrumenti Musicali* v. *United States*, 837 F.2d 465, 467 (Fed. Cir. 1988). "[A] court cannot assume that the government's position was not substantially justified simply because the government lost on the merits." *Morgan* v. *Perry*, 142 F.3d 670, 685 (3d Cir. 1998), cert. denied, 525 U.S. 1070 (1999); see *Dantran, Inc.* v. *United States Dep't of Labor*, 246 F.3d 36, 40-41 (1st Cir. 2001).

Petitioner has pointed to no case in which a court of appeals has held categorically that the invalidation of a regulation at step one of the *Chevron* analysis necessarily requires a finding of no substantial justification. To the contrary, in *Halverson*, the D.C. Circuit "emphasize[d] that [it did] not rel[y] solely on the fact that the merits panel resolved this case on *Chevron* step one grounds," noting that "other *Chevron* step one cases have presented quite difficult issues and involved 'substantially justified' arguments on both sides," 206 F.3d at 1211. Similarly, in *FEC* v. *Political Contributions Data, Inc.*, 995 F.2d 383, 387 (1993), cert. denied, 510 U.S. 1116 (1994), the Second Circuit explained that "[w]e come to this conclusion not because the government lost its claim, but because a previous panel of this court determined that the statutory language and legislative history were clear." See *ibid.* (describing its holding as predicated on "this unusual situation where a previous panel has specifically passed on every question before us, and has found the Commission's position to have

been unreasonable in that it frustrated the intent of Congress and might jeopardize first amendment rights"). Thus, far from adopting the categorical rule advocated by petitioner (Pet. 18), each court of appeals properly limited its substantial justification decision to the circumstances of the particular case. *FEC*, 995 F.2d at 387; *Halverson*, 206 F.3d at 1212.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

MONROE WHITE, SR.,

Petitioner,

v.

R. JAMES NICHOLSON,
Secretary of Veterans Affairs,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

1. Because the Seventh, the District of Columbia, and the Federal Circuits all applied the "totality of the circumstances" standard, the government asserts that there is no conflict. Opp. Reply, page 10. The government's analysis is flawed. It confuses "substantially justified" – the statutory standard which the government must meet to avoid an award of fees under the Equal Access to Justice Act (EAJA) – with "totality of the circumstances" – the scope of review, that is, the broad range of factors that a court must review to determine if the government's conduct was substantially justified. The Federal Circuit's decision in Petitioner White's case creates a conflict in the circuits under the former, not the latter.

a. *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L.Ed.2d 490 (1988) construed "substantially justified" as used in 28 U.S.C. § 2412(d)(1)(A) to mean that the government must show that its conduct had a reasonable basis in law and fact, that is, even though the government's position was not correct, could a reasonable person have thought it correct.

b. The phrase "totality of the circumstances" is not a criterion for an EAJA award. That phrase is not found in the EAJA statute. Instead, it defines the broad scope of the factors which the court must review in reaching a decision on the issue of whether the government's conduct was substantially justified. *See,* 28 U.S.C. § 2412(d)(1)(B) ("Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees

and other expenses are sought[;]" and, 28 U.S.C. § 2412(d)(2)(D), " 'position of the United States' means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based[.]")

This view, that "totality of the circumstances" refers to the scope of factors to be considered by the court, is consistent with this Court's use of that term to define a broad range of inquiry as opposed to a single factor or bright line test for reasonableness. *See, e.g., Blackburn v. State of Alabama*, 361 U.S. 199, 206, 80 S. Ct. 274, 280, 4 L.Ed.2d 242 (1960) (in the context of review of a police interrogation, " . . . the range of inquiry in this type of case must be broad, and this Court has insisted that the judgment in each instance be based upon consideration of 'the totality of the circumstances.' "); *U.S. v. Sokolow*, 490 U.S. 1, 8, 109 S. Ct. 1581, 1587, 104 L.Ed.2d 1 (1989) (in evaluating whether law enforcement personnel had reasonable suspicion to make a stop, court must consider "the totality of the circumstances – the whole picture."); *Georgia v. Ashcroft*, 539 U.S. 461, 480, 123 S. Ct. 2498, 2511, 156 L.Ed.2d 428 (2003) (in assessing totality of circumstances in a legislative redistricting case, court should not focus on one factor).

c. Thus, the circuits' recitation of a "totality of the circumstances" scope of review does not create the conflict. Rather, the conflict is created by the circuits' disparate application of the *Pierce* reasonable basis in law test in cases where an agency promulgates and enforces a facially invalid regulation.

Circuits other than the Federal Circuit follow *Pierce* because they require the government to meet its EAJA

statutory burden to demonstrate substantial justification, that is, to show that the agency had a reasonable, albeit incorrect, basis in law to believe that it was authorized to promulgate and enforce the offensive regulation.[1]

In contrast, the Federal Circuit's *Johnson* rule disregards *Pierce's* reasonable basis in law test in favor of a per se rule which deems the agency to be substantially justified without requiring the agency to show that a reasonable person could have thought that the law nevertheless authorized the agency to defy the unambiguously expressed intent of Congress.

2. The government asserts that there was no abuse of discretion in the lower court's substantial justification decision. Opp. Reply, pages 7, 10. The government concludes that this is a "fact-bound, case-specific conclusion [which] does not warrant further review of this Court." Opp. Reply, page 10.

To the contrary, this case presents a legal issue: whether the *Johnson* rule is an incorrect rule of law. If it is, then the court below abused its discretion. *Koon v. U.S.*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2048, 135 L.Ed.2d 392 (1996) (A district court by definition abuses its discretion when it makes an error of law; abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions); *Martin v. Franklin Capital Corp.*, ___ U.S. ___, 126 S. Ct. 704, 710, 163 L.Ed.2d 547 (2005) (a motion to a court's discretion is

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[1] *Role Models America, Inc. v. Brownlee*, 353 F.3d 962, 967 (D.C. Cir. 2004); *Halverson v. Slater*, 206 F.3d 1205 (D.C. Cir. 2000); *Marcus v. Shalala*, 17 F.3d 1033 (7th Cir. 1994) (rehearing and suggestion for rehearing denied *en banc* May 24, 1994).

not to its inclination but to its judgment, and its judgment is to be guided by sound legal principles; limiting discretion according to legal standards helps promote basic principle of justice that like cases should be decided alike.).

In support of its contention that there was no abuse of discretion, the government asserts that its promulgation and enforcement of a facially invalid regulation was reasonable because the agency desired to promote administrative efficiency and improve its backlog in claims adjudications. Opp. Reply, page 8-9. This suggests either that the agency affirmatively believed that it had the discretion to override the clearly expressed intent of Congress if it found the requirements of statute to be burdensome; or, at the least, that the agency was unaware that it was not authorized to craft a remedy for administrative inefficiency that violated the unambiguous language of the controlling statute. An actor's effort to avoid responsibility by claiming ignorance of that which he objectively ought to know is described by courts as the "clean heart, empty head" defense.[2] It creates a subjective standard which varies from case to case because it depends on what the actor knew or believed, rather than what a reasonable person should have known or believed. Because it is subjective, it is irreconcilable with *Pierce's* objective "reasonable" person standard.

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[2] *See, e.g., Studiengesellschaft Kohle, m.b.H. v. Dart Industries, Inc.*, 862 F.2d 1564, 1579 (Fed. Cir. 1988) (patent case); *In re Health-South Corp.*, 308 F. Supp.2d 1253, 1287 (N.D. Ala., 2004) (construction of insurance contract); *Principe v. Assay Partners*, 154 Misc.2d 702, 708, 586 N.Y.S.2d 182 (N.Y.Sup. 1992) (Rule 11 sanctions case); *Smith v. Ullman*, 874 F.Supp. 979, 987 (D. Neb., 1994) (issue of negligence of prison personnel for failure to protect inmates against predatory inmate violence).

In any event, with respect to the invalid regulation pertinent to Petitioner White's case, the questions of 1) whether the statute was ambiguous, or 2) whether the agency's goals of administrative efficiency trumped the intent of Congress were decided against the government in the litigation on the merits. A three-judge panel from the Federal Circuit unanimously agreed 1) that the agency's regulation was invalid under *Chevron's* Step One because the statute was unambiguous; and, 2) that the agency had "no choice" but to give effect to Congress' clear intent. *Disabled American Veterans (DAV) v. Secretary of Veterans Affairs*, 327 F.3d 1339 (Fed. Cir. 2003). Neither the Veterans Court nor the Federal Circuit disturbed these findings in the EAJA litigation.

3. The government asserts that the petitioner cannot obtain fees because he has not established that he was a prevailing party. Opp. Reply at page 6. In fact, the Veterans Court did not find that Petitioner White was *not* a prevailing party. It assumed that he was, and proceeded to deny his EAJA petition on the stated ground that the government's conduct in promulgating and enforcing a facially invalid regulation was substantially justified. App. 12-13. The Federal Circuit did not disturb the lower court's assumption with respect to prevailing party status. It affirmed the substantial justification analysis.

4. The government asserts that the Petitioner advocates adopting a categorical rule, that invalidation of a regulation at Step One of the *Chevron* analysis necessarily requires a finding of no substantial justification. Opp. Reply, pages 13-14.

In fact, Petitioner White seeks to un-do the Federal Circuit's *Johnson* rule, which cannot be reconciled with

Pierce's reasonable basis in law and fact test, or with other circuits' interpretation and application of *Pierce*.

Whether a legal determination in the litigation on the merits (rejecting the agency's legal interpretation because it conflicts with the plain and unambiguous meaning of other controlling law) should control the *Pierce* reasonable basis in law test in the subsequent EAJA litigation has already been addressed in favor of claimants and against the government in *Federal Elections Commission v. Political Contributions Data, Inc.*, 995 F.2d 383 (2nd Cir. 1993), cert. den., *Federal Election Commission v. Political Contributions Data, Inc.*, 510 U.S. 116, 114 S. Ct. 1065 (1994). The government's present resistance to this holding provides additional support for review in order to promote uniformity of legal standards and "the basic principles of justice that like cases should be decided alike." *Martin, supra*, ___ U.S. ___, 126 S. Ct. at 710.

CONCLUSION

The petition for a writ of certiorari should be granted.

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